Nos. 17-1717 & 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF MAJOR GENERAL PATRICK BRADY AND VETERANS GROUPS ERECTING AND MAINTAINING WAR MEMORIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Nearly a century ago, the Bladensburg World War I ("WWI") Memorial—like countless other monuments—was dedicated to honor and memorialize 49 soldiers from Prince George's County, Maryland, who gave their lives in service to our country. Does that Memorial violate the Establishment Clause merely because it is shaped like a cross?

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INTEREST OF *AMICI CURIAE*

Amici curiae are Major General Patrick Brady—a Medal of Honor recipient and one of the most decorated soldiers in American history—and seven veterans groups representing thousands of veterans. Descriptions of all *Amici* and their particular interests in this case appear in the appendix to this brief. *Amici* are dedicated to honoring and serving veterans and their families, as well as publicly remembering those who gave their last full measure of devotion for the cause of freedom.[1]

This case is about how our country may commemorate its fallen servicemembers. *Amici* seek to ensure that existing memorials are undisturbed and protected as public monuments to venerate the honor, valor, and sacrifice of those who have died in service to this country. In Judge Wilkinson's words, *Amici* want to make certain that "those honored [are left] to rest in peace."

Several *Amici*, like many other veterans groups across the country, are also designing new memorials to honor their fallen comrades. But, because of the confusion and unpredictability that characterizes current Establishment Clause jurisprudence, they have no clear standard by which to predict what symbols, designs, or words might run afoul of the Establishment Clause.

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel funded its preparation or submission.

For example, some *Amici* are designing the General Hays Veterans Memorial that will be built in Hays, Kansas, and will commemorate the service of veterans from the "High Plains" of Northwest Kansas.[2] The current design for that memorial is simple: five individual walls positioned in the shape of a star, each representing a branch of the armed forces. The entrance plaque to the memorial would include a fitting quote, attributed to Jesus: "Greater love hath no man than this, that a man lay down his life for his friends." Under current Establishment Clause jurisprudence, one person who happened to take offense to this quote could potentially scuttle *Amici*'s efforts to commemorate veterans' noble sacrifices.

The confused state of the law chills *Amici*'s efforts to honor veterans by erecting new memorials and maintaining existing ones. *Amici* have a strong interest in this Court providing a clear, consistent, and predictable standard for analyzing passive displays under the Establishment Clause. This clarity is needed so that *Amici* may design veterans' memorials without inviting needless litigation.

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[2] See Patriot Outreach, General Hays Veterans Mem'l, http://www.patriotoutreach.org/General_Hays_Veterans_Memorial.html (last accessed Dec. 17, 2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a WWI memorial in Bladensburg, Maryland that was dedicated nearly a century ago for the sole purpose of honoring 49 soldiers who gave their lives in service to our country. The Fourth Circuit decided that the Bladensburg Memorial is unconstitutional because it is shaped like a cross. That decision is wrong. This Court has never held that the Establishment Clause requires eradicating any symbol with religious meaning from the public square. Not only does the Fourth Circuit's decision below jeopardize other, similar memorials, it also conflicts with this Court's precedent in two primary respects.

First, the Fourth Circuit improperly lowered the Article III standing requirements for Establishment Clause claims. The court held that mere subjective offense at a government expression that recognizes or even alludes to religion is itself sufficient to confer standing. Numerous other courts of appeals have agreed with the Fourth Circuit. This Court should reaffirm that this 'offended observer' standing does not pass constitutional muster because "psychological consequence presumably produced by observation of conduct with which one disagrees" is never a sufficient injury in fact. *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Second, the Fourth Circuit's application of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), is exemplary of "the strange Establishment Clause geometry of crooked lines and wavering shapes [that *Lemon*'s]

intermittent use has produced." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Kennedy, J., concurring). This case offers the Court an ideal opportunity to overrule *Lemon* and replace it with a test tied to the Establishment Clause's history and purpose. Government acknowledgements of religion do not offend the Constitution if they have no concrete impact on religious freedom, such as forcing or coercing participation in religious activities or actually threatening to establish a state religion.

Justices of this Court have distilled this liberty-based principle, rooted in history, into two core areas of concern: the government cannot (1) force people to "support or participate in any religion or its exercise;" or (2) "give direct benefits to a religion in such a degree that it in fact establishes a state religion, or tends to do so." *Cty. of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 659, 667 (1989) (Kennedy, J., concurring and dissenting in part); see also *Town of Greece* v. *Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring).

This liberty-based principle embraces the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life," *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984), rather than dismissing historical practices as random gestures undertaken without justification. Further, it stops courts from displaying hostility to religion by looking for a less-religious alternative where "there will always be a more secular alternative available." *Allegheny*, 492 U.S. at 676 (Kennedy, J., concurring and dissenting in part).

By making individual liberty the touchstone of a First Amendment violation, the Establishment Clause will regain objective meaning capable of guiding lower courts, officials, and citizens. Such a test makes historical practices and their modern counterparts guideposts, not anomalies. This Court should therefore overrule *Lemon* and enunciate a new Establishment Clause test that functions as a structural restraint on the government actually establishing a state religion.

ARGUMENT

I. Respondents lack standing because personal offense is an insufficient injury in fact to confer it.

Although Petitioners have not raised standing, it is "jurisdictional and not subject to waiver." *Lewis* v. *Casey*, 518 U.S. 343, 349 n.1 (1996). This Court is able "to address the [standing] issue even if the courts below have not passed on it, and even if the parties fail to raise" it. *United States* v. *Hays*, 515 U.S. 737, 742 (1995) (quotation omitted). The "irreducible constitutional minimum of standing" includes the requirement of an "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact requires proof of "an invasion of a legally protected interest" that is "concrete and particularized." *Ibid.*

Standing does not exist where the only alleged injury is the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. *Valley Forge* held that only litigants who were "subjected to unwelcome *religious exercise* or were forced to assume

special burdens to avoid them" have the requisite injury in fact to bring Establishment Clause claims. *Id.* at 486 n.22 (emphasis added).

The Fourth Circuit lowered that Article III bar when it held that "regularly encounter[ing] the Cross as residents while driving in the area" was sufficient to give Respondents standing to seek the Memorial's removal. *Am. Humanist Assoc.* v. *M-NCPPC*, 874 F.3d 195, 203 (4th Cir. 2017). Many other courts of appeals have ignored this Court's injury-in-fact standard. Instead of requiring those raising an Establishment Clause claim to prove that the government is conducting some religious exercise and requiring participation in that exercise, mere observation, or "unwelcome contact," with a display that has a religious element is frequently found to be sufficient for standing. See *id.* at 204 (unwelcome contact sufficient to confer standing); *Freedom From Religion Found., Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (same); *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012) (same); *Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (*en banc*) (same). In short, courts have developed an Establishment Clause standing jurisprudence that is "impossible to reconcile with *Valley Forge*," *Books* v. *Elkhart Cty.*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting), an error-ridden jurisprudence that this Court should correct.

This Court has already rejected the notion that Establishment Clause claims require a lesser degree of injury than others. *Ariz. Christian Sch. Tuition*

Org. v. *Winn*, 563 U.S. 125, 146 (2011) (hereinafter "*ACSTO*") ("To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III."). And as *Valley Forge* explained, "'the assumption that if respondents have no standing to sue, no one would have standing, is *not* a reason to find standing.'" 454 U.S. at 489 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (emphasis added)). Petitioners' lack of standing in this case does not foreclose the opportunity to redress an offense. Citizens routinely and properly use the ballot box to encourage or discourage government action on innumerable matters outside of a court's jurisdiction.

Here, the only injury Respondents allege is personal offense, with no compulsion or coercion to participate in any religious exercise. Respondent Lowe's sole alleged injury is being "personally offended and feel[ing] excluded by this governmental message." JA29. But no one is forcing Mr. Lowe to view the Memorial or excluding him from anything. See JA2950, M-NCPPC, 874 F.3d 195 (4th Cir. 2017) No. 14-550. Respondent Edwords alleges unwelcome viewing of the Memorial on several occasions. See JA30. Again, there is no government compulsion or coercion related to that viewing, and no one is making Mr. Edwords unwelcome. See JA2763, M-NCPPC, 874 F.3d 195 (4th Cir. 2017) No. 14-550. Finally, Respondent McNeill believes that the Memorial is "a religious symbol, and that—it offends [him] at its deepest core." *Id.* at 2832. But the government is not forcing him to hold that belief or to visit the Memorial at all. *Id.* at 2830.

In sum, no evidence exists that the government has forced Respondents to participate in any religious exercise or assume any special burden to avoid doing so. And viewing the Memorial is not a religious exercise in and of itself. Respondents lack standing because their only alleged injury in fact—subjective personal offense—is insufficient to confer it.

None of this is to say that standing will never exist in Establishment Clause cases. Plaintiffs "may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as mandatory prayer in a public school classroom." *ACSTO*, 563 U.S. at 129–30. But no such injury is alleged here. Despite the sincere offense Respondents claim when driving past the Bladensburg Memorial, viewing a passive display honoring our nation's veterans is not a religious exercise.

Because drive-by offense is not sufficient for Article III standing, this Court should hold that Respondents lack standing to seek the Memorial's removal and reaffirm that the mere "observation of conduct with which one disagrees" does not constitute an injury in fact sufficient to confer standing. *Valley Forge*, 454 U.S. at 485.

II. *Lemon* should be overruled as ahistorical and incapable of consistent application.

In addition to Respondents' lack of standing, there is no clear standard to evaluate their Establishment Clause claim. The *Lemon* test was originally formulated to decide whether direct state funding to private religious schools violated the Establishment

Clause. *Lemon*, 403 U.S. at 606. But, 47 years later, *Lemon* is a failure. It has defied consistent application, resulting only in irreconcilable and incoherent jurisprudence, particularly for passive observation of government expressions that in one way or another acknowledge the role that religion plays in American life. See, *e.g.*, *Lamb's Chapel*, 508 U.S. at 398–99 (Scalia, J., concurring) (collecting cases applying, ignoring, or criticizing *Lemon*); *Comm. for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*").

The impossibility of applying *Lemon* consistently has only become more apparent as this Court continues to "continually try to patch [it] up." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring). These additions to *Lemon* include the "endorsement" test, *Lynch*, 465 U.S. at 687–94 (1984) (O'Connor, J., concurring), which ultimately modified *Lemon*.

The *Lemon*/endorsement test produces inconsistent results because it hinges on the perceptions of an imaginary observer who is often "biased, replete with foibles, and prone to mistake." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1108 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of rehearing *en banc*). It does not provide meaningful guidance for judges or litigants because—after nearly 50 years—no one agrees on what the "objective observer" sees, knows, or feels. See *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 19 (2011) (Thomas, J., dissenting from the denial of certiorari). Rather,

Lemon habitually yields plurality opinions that fail to provide lower courts, officials, and citizens with useful guidance. See *Wallace* v. *Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

Further, the *Lemon* test offers no guidance to courts on how they should consider historical acknowledgments of religion. While this Court has held that the historical context of a monument is relevant, *Van Orden* v. *Perry*, 545 U.S. 677, 689 (2005) (plurality) *and* at 699 (Breyer, J., concurring), the scope of the relevant history varies depending on the jurist's perspective. For example, when considering a Ten Commandments display in Texas, the *Van Orden* plurality noted that "[o]ur opinions, like our building, have recognized the role the Decalogue plays in America's heritage." *Ibid.* (plurality). But, on that same day, this Court also held that a different Ten Commandments display in Kentucky violated the Establishment Clause in part because the framers of the Bill of Rights did not have a "common understanding about the limits of the establishment prohibition." *McCreary* v. *ACLU of Ky.*, 545 U.S. 844, 879 (2005). These dueling opinions create confusion about the weight national history or a display's individual history should receive.

Because it focuses on individual perceptions and employs historical facts at random, Justice Kennedy rightly labeled the *Lemon*/endorsement test "unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring and dissenting in part). Its "unguided examination of marginalia," he wrote, "is irreconcilable with the imperative of applying neutral principles in constitutional adjudication," would

create "inevitable difficulties" for application, and "trivialize constitutional adjudication." *Id.* at 674–76.

Two decades later, Justice Thomas demonstrated that this warning had come true. See *Utah Highway Patrol*, 132 S. Ct. at 12 (Thomas, J., dissenting from the denial of certiorari). The *Lemon*/endorsement test has proven "entirely unpredictable," "render[ing] even the most minute aesthetic details of a religious display relevant to the constitutional question" and requiring the evaluation of these displays through the eyes of an ill-defined "hypothetical observer." *Id.* at 19, 20, 22. The result is that courts may hold memorials with a wholly secular purpose and effect unconstitutional due to "the *misperception* of an imaginary observer." *McCreary*, 545 U.S. at 901 (Scalia, J., dissenting) (emphasis in original). "That a violation of the Establishment Clause turns on an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so, is perhaps the best evidence that Establishment Clause jurisprudence has gone hopelessly awry." *Utah Highway Patrol*, 132 S. Ct. at 19 n.7 (Thomas, J., dissenting).

Further, cases like *Allegheny* and *McCreary* can be misread as instructing architects and designers to seek out a "less-religious alternative" to any element in a display that may have a religious connotation. *McCreary*, 545 U.S. at 847 (suggesting that "tablets with 10 roman numerals" could have referenced the Ten Commandments' historical value without "a sectarian conception of faith"); *Allegheny*, 492 U.S. at 618 (plurality) (holding that a menorah was

constitutional in part because there were no "reasonable alternatives that [were] less religious in nature" to celebrate Chanukah). This "less-religious alternative" rule creates a one-way ratchet that exhibits hostility towards religion and drives it from public view. It is one of the many ways that *Lemon* allows aversion to religion generally and to displays with religious symbolism in particular "to be enforced directly *through* the First Amendment." *Elmbrook Sch. Dist.* v. *Doe*, 134 S. Ct. 2283, 2283 (2014) (Scalia, J., dissenting from the denial of certiorari).

Lemon should be replaced because the Establishment Clause does not "compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring); see also *id.* at 690 (plurality). Constitutional adjudication must "deal[] with substance, not shadows." *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (internal quotation omitted). But *Lemon* is incapable of doing so. Because of *Lemon*, six Justices of this Court were forced to point out in *Buono* that the Establishment Clause does not create a *per se* rule against cross-shaped memorials. 559 U.S. at 721 (plurality) *and* at 747 n.7 (Stevens, J., dissenting). And on multiple occasions, *Lemon* has caused lower courts to ignore the fact that a cross-shaped memorial "evokes far more than religion": it "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.* at 721 (plurality). Any test that promotes such an ill-informed approach to constitutional decision-making should be jettisoned.

There is no need to belabor the disjointed state of Establishment Clause jurisprudence, because at least five members of this Court have advocated abandoning or at least significantly revising *Lemon*.[3] But lower courts are bound by *Lemon* until this Court overrules it. *E.g.*, *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1174 (11th Cir. 2018) ("And at least as matters now stand, neither *Lemon* nor *Rabun* has been 'directly overruled.' Accordingly, our hands are tied."); *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005) ("Until the Supreme Court overrules *Lemon*, . . . it remains binding law . . . ."); *Koenick* v. *Felton*, 190 F.3d 259, 264 (4th Cir. 1999) ("[U]ntil the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* . . . ." (internal citations omitted)); *ACLU of N.J.* v. *Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996) ("*Lemon* remains the law of the land . . . .").

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[3] *Buono*, 559 U.S. at 720–21 (2010) (plurality opinion of Kennedy, J., joined in full by Roberts, C.J.) (expressing doubt as to whether the endorsement test is "appropriate" for religious displays); *Utah Highway Patrol*, 132 S. Ct. at 21 (Thomas, J., dissenting from the denial of certiorari) (endorsement test "invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property."); *Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring) (rejecting "the literal application of any particular test"); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., statement respecting the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity."); *Davenport*, 637 F.3d at 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of rehearing *en banc*) ("But whether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear.").

Lemon fails to offer a workable or consistent Establishment Clause standard. See *Utah Highway Patrol*, 132 S. Ct. at 18–21 (Thomas, J., dissenting from the denial of certiorari). This chills *Amici* who desire to erect new monuments and protect historic memorials. Those designing, building, and maintaining memorials dedicated to our nation's fallen must parse a minefield of case law, hoping that they do not wrongly divine the attitudes of a certain court toward a particular memorial's content and setting. To correct this, the Court should overrule *Lemon* and pronounce an objective Establishment Clause test that produces predictable results that are consistent with our nation's history and tradition.

III. This Court should articulate an Establishment Clause standard defined by a liberty-based principle and rooted in our nation's history and tradition.

The First Amendment's text enunciates principles to protect liberty by linking three pairs of corollary rights separated by semicolons: free exercise of religion and freedom from the establishment of religion; free speech and free press; and peaceable assembly and right of redress to the government for grievances. See U.S. Const. amend. I. Each pair of rights works together.

When read collectively, "the common purpose of the Religion Clauses is to secure religious liberty." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (internal quotes and citation omitted). The Constitution achieves this goal by guaranteeing the freedom to approach and respond to one's faith (or lack thereof) as directed by conscience. The

Constitution limits the power of the government to interfere with that freedom, because a government-sponsored and supported church, with its corresponding authority to demand tribute or coerce participation in a religious exercise, violates an individual's liberty of conscience.

This liberty-based principle is evident in the views expressed by James Madison and his contemporaries who were directly engaged in the debates yielding the Religion Clauses. See, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 605–606 (1987) (Powell, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421, 428, 431–432 nn.13–16, 436 n.22 (1962); *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 12, 33–34 (1947). In arguing against the imposition of a state tax levied to support a church, Madison's foundational point highlights how the Free Exercise Clause and the Establishment Clause work in tandem to protect religious liberty:

> Because we hold it for a fundamental and undeniable truth, "that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."

Everson, 330 U.S. at 63–72 (reproducing Madison's Memorial and Remonstrance against Religious Assessments). The First Amendment's authors thus enunciated a cohesive understanding of both the Free Exercise and Establishment clauses, properly interpreted in conjunction with each other, to promote liberty, not viewed in isolation or pitted against each other.

A liberty-focused inquiry directs courts to objective questions of compulsion, coercion, and constraint without requiring an assessment of the subjective impact and ever-fluid meanings of religious doctrine, religious symbols, or the impact of evolving cultural appropriations and understandings. See, *e.g.*, *Alvarado* v. *City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) (finding a sculpture of the Aztec god, Quetzalcoatl, permissible because of a lack of cultural understanding and acceptance of what it was). Rather than centering on how a religious expression is perceived, a liberty-focused inquiry assesses the autonomy of the observer. When an observer is accorded the freedom to ignore, avoid, reject, and disagree with a religious acknowledgement or expression, it is an exercise of free will and religious liberty that should be celebrated, whether the author of the acknowledgement is the government or a private person.

A liberty-based principle does not strike down a civic acknowledgement of religion unless the acknowledgment threatens to establish an official religion or forces or coerces participation or direct financial support for religious exercises. This principle recognizes that all three branches of government have long embraced the public acknowledgement and accommodation of religion, particularly in the nation's early years. The Framers' acts illuminate a cohesive theory of constitutional interpretation. And these acts "must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today." *Town of Greece*, 572 U.S. at 579 (rejecting arguments that the Founder's acceptance of the "decidedly Christian nature" of historical legislative prayers are no longer relevant).

This Court has held that a proper theory of the Establishment Clause must welcome these historical practices and understandings along with their contemporary counterparts, not dismiss them. The Court has noted that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring and dissenting in part)).

As this Court has recognized, "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Ibid.*; see also *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennen, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."). Consequently, any practice, acknowledgement, or accommodation that comported with the Establishment Clause as practiced by the Founding Fathers does so now as well.

And any *modern* practice, acknowledgement, or accommodation that poses no greater threat of establishing a religion than its historical counterparts does not violate the Constitution either. In situations where the type of practice or expression at issue was not clearly permitted or forbidden at the Founding, historical analogies can be used. For example, in *Allegheny*, Justice Kennedy noted that "[i]f Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered

by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche . . . can be invalid." 492 U.S. at 665 (Kennedy, J., concurring and dissenting in part).

This does not suggest that a practice that is otherwise unconstitutional is permitted simply because it is old. Rather, a practice does not violate the Establishment Clause when history demonstrates that the act poses no credible danger of establishing a religion, based on the Founders' understanding of that term. As this Court explained when validating recurring government participation in an explicitly religious act:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become a part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step towards establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Marsh v. *Chambers*, 463 U.S. 783,792 (1984) (quoting *Zorach* v. *Clauson*, 343 U.S. 306 (1952)).

This Court in *Town of Greece* rebuked the suggestion that *Marsh* is an "exception" to a principled jurisprudence. 572 U.S. at 575

(acknowledging that "*Marsh* is sometime described as 'carving out an exception'"). The Court explained that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 576. Rather, history is a guide to demonstrate the Founders' understanding and proves that civic acknowledgements and accommodations of religion that do not limit individual liberty do not violate the Establishment Clause. *Id.* at 584–91 (simply witnessing a legislative prayer with which the observer disagrees is not coercive because "[o]ffense . . . does not equate to coercion"); accord *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 44 (2004) (O'Conner, J., concurring) ("[T]he compulsion of which Justice Jackson was concerned . . . was of the direct sort—the Constitution does not guarantee citizens the right to entirely avoid ideas with which they disagree.").

This liberty-based principle, illuminated by history, provides two limiting standards: the Government violates the Establishment Clause when it: (1) forces or coerces individuals to "support or participate in any religion or its exercise;" or (2) "give[s] direct benefits to religion in such a degree that it in fact establishes [that is, creates] a state religion or religious faith, or tends to do so." *Allegheny*, 492 U.S. at 659–60 (Kennedy, J., concurring and dissenting in part) (internal quotations omitted).

Below, *Amici* outline these two standards using non-exhaustive examples of areas of historical practice or concern, and legal precedent to demonstrate

their application. *Amici* then apply these standards to the facts of this case.

A. The government cannot limit individual liberty by forcing or coercing participation in any religious exercise.

The first liberty-based principle addresses the primary evils that the Establishment Clause was designed to avoid: religious exercise or professions of faith made "by force of law," *Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting), and forced abandonment of particular religious beliefs to qualify for certain public "duties, penalties, privileges, or benefits," *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978).

One of the hallmarks of a religious establishment is the government forcing or coercing participation or attendance at purely religious activities, or requiring citizens to take religious oaths to hold public office. See, *e.g.*, *Lee*, 505 U.S. at 640 (Scalia, J., dissenting); accord *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting in part); *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring). Nations with established churches punished citizens for "such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of nonbelief in their doctrines, and failure to pay taxes and tithes to support them." *Everson*, 330 U.S. at 9. The Establishment Clause was created to avoid such abuse of legal force to proscribe religious belief or practice. *Ibid.*

A liberty-based analysis focuses on the autonomy of the individual. When government action does not force an individual to engage in religious exercise, make a profession of faith, or abandon a certain belief, individual religious liberty is not compromised in this respect. An individual is not coerced by a civic acknowledgement of religion provided the person is not required to affirm that acknowledgment or conform his or her behavior in acquiescence.

For example, passive observers of (1) a display, (2) currency incorporating religious expression, (3) religious expression during an inauguration prayer, (4) recitation of the Pledge of Allegiance, or (5) a call for prayer by public officials in response to a national tragedy, may experience psychological aversion but—absent other factors—their right to believe what they will and practice religion (or not) as they see fit is not compromised. See, *e.g.*, *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting in part) ("No one was compelled to observe or participate in any religious ceremony or activity."). An individual's voluntary decision to avoid a civic acknowledgement is properly protected as a respect for freewill and a demonstration of individual religious liberty.

Under this first liberty-based principle, the Establishment Clause is violated when the government forces or coerces individuals to actively support or participate in a religious exercise. It is also violated when the government conditions a public benefit on the support or abandonment of a particular religious belief. An absence of those factors strongly suggests the government is *not* establishing a public religion.

B. The government cannot limit religious liberty by giving direct benefit to religion to such a degree that it creates a state religion or institutes a particular creed.

The Establishment Clause was created in direct response to European powers forcing individuals to pay taxes or tithes to a certain church or religious group. Forced tribute to promote and support a religious exercise is a distinct mechanism that European countries and early American colonies and states used to give impermissible direct benefit to a state-favored religious sect. *Everson*, 330 U.S. at 8. Indeed, it was a Virginia tax to support teachers of the Christian religion that prompted Madison to publish his Memorial and Remonstrance. *Edwards*, 482 U.S. at 606 (Powell, J., concurring).

But the Establishment Clause is not violated when the government merely allows religious institutions and people equal access to funding as part of a general "public benefit." *Trinity Lutheran Church* v. *Comer*, 137 S. Ct. 2012, 2024 (2017) (allowing church to access a government grant to increase safety on playgrounds on the same basis as similarly-situated community organizations). Neither is it violated "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious [entities] wholly as a result of their own genuine and independent private choice." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002); accord, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[G]overnment programs that neutrally provide benefits to a broad class of

citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."); *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (state aid program that funds religious entities only through individual choice "works no state support of religion prohibited by the Establishment Clause"). Granting equal access to public benefits irrespective of faith promotes the exercise of liberty and the full civic engagement of religious institutions and individuals, and thus is not of Establishment Clause concern.

Aside from taxes or forced tithes, another form of direct benefit is government promotion of distinct religious tenets which place the government's weight behind an obvious effort to convert a citizen's beliefs toward a particular religion. See *Allegheny*, 492 U.S. at 659–60 (Kennedy, J., concurring and dissenting in part). There may be circumstances where a government action falls short of forcing individual participation, but the weight of the state is intentionally and obviously positioned to influence or pressure the beliefs of the individual. For example, observing legislative prayer is not coercive, but the government's exposing citizens to a prolonged pattern of legislative prayers that denigrate nonbelievers, seek conversion, or threaten damnation may violate the Establishment Clause. See *Town of Greece*, 572 U.S. at 583. While a citizen's religious liberty is not compromised by the government merely acknowledging religion or religious ideas, an obvious attempt to *convert* individuals to a specific religious belief can be of constitutional concern.

Yet, objection to religious expression that an entity or person represents to be true, in and of itself, does not constitute an effort to convert nor is it a violation of the Establishment Clause. See *Town of Greece*, 572 U.S. at 589 (plurality). Pluralistic societies cannot function without tolerance of conflicting views. "Adults often encounter speech they find disagreeable" in our country, which allows robust debate and the opportunity to learn from others' perspectives. *Ibid.* Based on the historical record and this Court's precedent, the Establishment Clause cannot be violated "any time a person experiences a sense of affront from the expression of contrary" viewpoints, of the religious or non-religious variety. *Ibid.*

In sum, a proper focus on individual liberty prevents the government from granting direct financial aid for the purpose of supporting religious exercise. Likewise, it limits the ability of the government to interfere with the exercise of conscience and the freedom to accept or reject a personal understanding of the Divine and any corresponding duty owed thereto.

C. Applying the liberty-based principle here, the Bladensburg Memorial does not constitute an establishment of religion.

This case is well within the confines established by a liberty-based approach to the Establishment Clause. The Bladensburg Memorial is a passive display that does not violate the Constitution.

Because a liberty-focused inquiry necessarily examines the potential impacts on Respondents' individual liberty to participate or decline to participate in religious exercises, *Amici*'s proposed test requires scrutiny of how the Bladensburg Memorial affects Respondents. Respondents' beliefs and sincere objections warrant this Court's respect. But, without discounting Respondents' subjective offense, the Memorial does not force their participation in any exercise of religion whatsoever. First, Respondents are free to disagree with any message conveyed by the Memorial without fear of government reprisal. And their disagreement with a perceived message is not enough to violate the Establishment Clause. See *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting in part) ("Passersby who disagree with the message conveyed by [such] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.").

Second, the presence of a war memorial shaped like a cross does not provide such direct benefit to a particular faith that it tends to lead to the establishment of a state church. Nearly 100 years of history demonstrates that a war memorial shaped in a manner widely recognized to symbolize selfless sacrifice does not in fact establish a religion. As the plurality in *Buono* recognized when discussing a cross-shaped military memorial, "[p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers." 559 U.S. at 715.

Removing the Bladensburg Memorial would not further Respondents' religious liberty. It would only show disrespect for the brave servicemembers the cross was meant to honor. Further, it would be "interpreted by some as an arresting symbol of a Government that is not neutral but *hostile* on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Id.* at 726 (Alito, J., concurring) (emphasis added).

In particular, removing the Memorial's arms—as the Fourth Circuit suggested—would "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). Because the Bladensburg Memorial's existence does not implicate the liberty-based concerns underlying the First Amendment's Religion Clauses, as outlined above, and because the Memorial's defacement would signal religious hostility, this Court should reverse the Fourth Circuit's judgment.

* * *

Establishment Clause analysis under the *Lemon*/endorsement test has devolved into a "jurisprudence of minutiae," *Allegheny* 492 U.S. at 674 (Kennedy, J., concurring and dissenting in part), that has left each memorial's constitutionality up to "judicial predilections," *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). This "Court's precedent raises the concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections" alone. *Ibid.* This uncertainty puts *Amici* in the untenable position of

choosing how to honor the fallen based on the application of one or more inconsistently-applied tests and the unpredictable and ever-changing subjective feelings and emotions of passersby.

Accordingly, the Court should overrule *Lemon* and replace it with a liberty-based principle that is guided by our nation's history. The test should protect individuals from the government forcing them to participate in or directly finance religious exercise, and from being subjected to the creation of a government-established religion. But the test should not result in the complete banishment of any religious language or symbolism—including language or symbolism that someone *might* associate with religion—from the public square.

CONCLUSION

The judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

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DESCRIPTION OF *AMICI* AND THEIR PARTICULAR INTERESTS

Major General Patrick H. Brady (United States Army, retired) is a recipient of the Medal of Honor—the highest award for military valor that can be given to a member of the United States Armed Forces. He received the Medal of Honor for conspicuous gallantry and intrepidity in action at the risk of his life, above and beyond the call of duty, in the Vietnam War. Indeed, General Brady is credited with over 2,000 combat missions, in which he and his crew rescued over 5,000 severely wounded soldiers. He has been regarded as America's most decorated living veteran. General Brady views the cross as a symbol of selfless service, valor, and the giving of one's life for others. As such, it is often used to recognize honorable military service. General Brady himself was awarded a Distinguished Service Cross and six Distinguished Flying Crosses for his courageous service, each of which includes the emblem of an actual cross:

Distinguished Service Cross[1]

Distinguished Flying Cross[2]

General Brady strongly believes it would be absurd for a court, or anyone else, to hold that military medals like these violate the Constitution, simply because they are granted by the federal government and may cause alleged offense to someone who subjectively perceives such medals of valor to convey some sort of religious message. He believes just as fervently it is absurd to conclude the Constitution requires the defacement or removal of crosses honoring fallen veterans at war memorial sites, like the Bladensburg Memorial.

Patriot Outreach provides compassionate tools and services that help veterans develop personal coping strategies to achieve victory over PTSD, and works to instill in veterans the conviction that their lives remain necessary to the survival of others suffering from PTSD and suicidal thoughts. Patriot Outreach has distributed more than 250,000 separate

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[1] https://commons.wikimedia.org/wiki/File:Army_distinguished_service_cross_medal.png (last accessed July 18, 2018).

[2] https://commons.wikimedia.org/wiki/File:Dfc-usa.jpg (last accessed July 18, 2018).

coping resources online and serves more than 2,000 veterans per year through in-person volunteer work and group activities. Patriot Outreach is attuned to the reality that veterans suffering from PTSD experience particularly severe, deleterious reactions when symbols of America or military service are disrespected or defaced, and expect that any action to remove the Bladensburg Memorial would likely cause at least some veterans who suffer from PTSD to experience severe episodes of very stressful emotional trauma. Moreover, Patriot Outreach is involved in the process of erecting two separate memorials to veterans on public property: the Parkville Veterans Memorial in Parkville, Missouri, and the General Hays Veterans Memorial in Hays, Kansas. Patriot Outreach needs clarity regarding what symbols, designs, and words may be included as part of these memorials if they hope to avoid a potential federal lawsuit. Considerations include whether it is constitutionally permissible to commemorate veterans and their sacrifice by incorporating a cross, or a Bible verse (with or without attribution to Jesus), or a symbol or phrase associated with some other religious book or leader. Specifically, Patriot Outreach desires to include an entrance plaque to the General Hays Veterans Memorial that reads: "'Greater love hath no man than this, that a man lay down his life for his friends.'— *Jesus.*" But Patriot Outreach is currently chilled in its efforts to proceed because of the potential litigation and uncertainty associated with attempting to use any symbol or phrase honoring valorous military service that could theoretically be perceived by someone as conveying a

religious message. Patriot Outreach seeks clarity in the law that will permit it to fully honor veterans with memorials in ways it determines most meaningful for communicating gratitude for their military service.

Casper J. Middlekauf American Legion Post 173 based in Hays, Kansas is the local American Legion post in that community, comprised of veterans who are committed to mentoring youth and sponsoring wholesome programs for their development, advocating patriotism and honor, and supporting active duty military members and other veterans (as well as their families). Post 173 has over 300 members. ***The Society of 40 Men & 8 Horses Voiture 1543*** based in Hays, Kansas is the local chapter in that community of a broader fraternal and charitable honor society of American veterans. It was chartered to promote the well-being of veterans and their families (including widows, widowers, and orphans), and to actively participate in charitable endeavors in the community (such as through its nurse training and child-welfare programs). It has 28 members. ***The Edwin A Shumacher Marine Corps League, Detachment 740*** based in Hays, Kansas is the local chapter in that community of the Marine Corps League, bringing together United States Marine Corps veterans for the purposes of camaraderie and fellowship in order to preserve the traditions and promote the interests of the Marine Corps. It has eighteen members. These three groups are participating together with Patriot Outreach in the process of creating the General Hays Veterans Memorial. Like Patriot Outreach, they are in a state

of uncertainty as to whether their desired design that includes a well-recognized statement by Jesus (that there is no greater expression of love than for a man to lay down his life for his friends) will be considered constitutionally permissible or will lead to oppressive litigation. These organizations are therefore also in need of clear rules and guidelines governing allowable content for new memorial displays.

American Legion Newport Harbor Post 291 based in Newport Beach, California is the local American Legion chapter in that community, which focuses its mission on serving the various needs of veterans (through many projects, and the donation of over $100,000 per year to veterans in financial need), protecting children and youth, and defending traditional patriotic American values. Post 291 is the largest active American Legion post in the United States, with over 4,000 wartime veteran members, and an additional 3,000 members of the Sons of the American Legion or the Auxiliary. Uniquely, Post 291 operates its own Defense of Veterans Memorials Project, protecting memorials "where they are, as they are" against desecration by individuals and organizations allegedly offended by the sight of a cross or other symbol that may have religious significance in addition to its significance for honoring veterans. Post 291 was actively involved in the successful fights to preserve the Mojave Desert National Veterans Memorial and the Mt. Soledad National Veterans Memorial, both of which contain crosses as part of their commemoration of veterans. Post 291 seeks clarity in the law to avoid the need to

expend precious time and resources defending memorials that should not be considered controversial. It also seeks clarity in the law to extinguish the fear it currently has regarding whether memorials it is planning to construct on city property to honor the service of veterans, and a veterans cemetery it is actively engaged in trying to establish in Orange County, California, will provoke lawsuits if crosses or other elements that may have a religious connotation in addition to their significance for commemorating military service are included.

Father Vincent Capodanno Memorial Catholic War Veterans Post 1974 based in Liberty, Missouri is the local post of the Catholic War Veterans in that community. Its mission is to serve veterans physically, mentally, and spiritually, without regard to their individual characteristics. Catholic War Veterans is one of only three faith-based Veterans Service Organizations chartered by the federal government. Members of Post 1974 believe strongly that, in the context of the Bladensburg Memorial, the cross reflects the selfless sacrifice of those who served and gave their lives in WWI. Post 1974 is adamantly opposed to the removal of the Bladensburg Memorial.

Combat Veterans for Congress PAC supports the election of veterans for Congress who are dedicated to reining in government spending, protecting the freedoms provided Americans by the U.S. Constitution, and who have actively demonstrated their wiliness to "go into harm's way" to protect and defend teammates engaged in combat.

It supports the election of combat veterans who are committed to the free enterprise system and a strong national defense, and who will endorse teaching U.S. history and the Founding Father's core values in educational institutions. Combat Veterans for Congress PAC's leadership strongly opposes removing the Bladensburg Memorial because doing so would disrespect the service, appreciation, and remembrance of combat veterans nationwide.